LENG YANG SUA & ANOR.

v.

NG YEN KEE & ANOR.

HIGH COURT MALAYA, MUAR
MAHADEV SHANKAR J
[CIVIL SUIT NO. 62 OF 1981]
22 DECEMBER 1985

TORT: *Negligence - Road accident - Vehicle wholly damaged - Issue of liability - Standard of care.*

DAMAGES: *Superficial injuries of 2nd plaintiff - First plaintiff suffered fractured right tibia and fibula - Shortening of ½ - Visible limp - Assessment of damages - No evidence as to loss of earnings.*

The 1st plaintiff in this case was the driver of a lorry laden with pineapples. The 2nd plaintiff acted as a lorry attendant. At the 17th milestone from Muar to Yong Peng, where there was a pickup point, the 1st plaintiff moved partly onto the grass verge of the left hand side of the road where he stopped and turned off his engine. The 1st defendant was the driver of the lorry who smashed into the rear of the 1st plaintiff's lorry while it was parked. The 1st defendant claimed that the 1st plaintiff stopped suddenly on the road itself without giving any previous warning of his intention to do so. As a result of the accident, the 1st plaintiff suffered a fracture of the right tibia and fibula and the 2nd plaintiff had some superficial injuries. The issues contested were on liability and quantum.

Held:

[1] Taking into account all the facts and the relevant evidence, there was no contributory negligence on the part of the plaintiffs. The 1st defendant is wholly to blame for the accident as he had failed to take reasonable care while driving his lorry.

[2] The 1st plaintiff was awarded RM15,000 for general damages of pain and suffering and loss of amenities. Transport, special expenses in hospital and outpatient treatment was RM450. The Judge awarded RM4,800 for the loss of the 1st plaintiff's lorry and RM7,200 for loss of earning capacity.

[3] A claim for special damages must be strictly proved. Where the best evidence available has been produced, the Court will do the best it can to make some award. But where evidence is or ought to be available and is not produced, the Court should not be left to speculate what would be an appropriate sum to award. Since the 1st plaintiff did not keep accounts of his purchases and sales, his profits or wages paid to his employees and his tax returns, no award was made for loss of earnings.

[4] The 2nd plaintiff suffered superficial injuries and was awarded RM2,000 as general damages for pain and suffering. The award for loss of earnings and transport expenses totalled RM300.

[5] Since all the special damages accrued before the writ was filed, a flat rate of 8% per annum interest was ordered on general and special damages from date of service of writ to the date of judgment. Thereafter, interest will be at 6% per annum up to realisation.

[Costs to be taxed and paid by defendants.]

Cases referred to:
Haron v. Macaulay [1969] 1 MLJ 169
De Cotta v. Tan Hock Lee [1972] 2 MLJ 173
Kwek How Bok v. Lee Sin Kweng [1966] 1 MLJ 185
Abdul Mokhti bin Haji Ahmad v. Idris b. Ibrahim [1977] 2 MLJ 85
Tan Song Gue v. Goh Ya Tian [1983] 1 MLJ 60
Qualcast (Wolverhampton) Ltd. v. Haynes [1959] AC 743

Other sources referred to:
Rear Vehicular Collisions, Pritam Singh Brrard, [1985] 1 CLJ 226
Indian Contracts Act, Pollock & Mulla, 9th Edn., p. 373

For the plaintiffs - E.Ramasamy; M/s. E. Ramasamy & Co.
For the defendants - F.C. Cheah; M/s. Lee & Cheah

JUDGMENT

Mahadev Shankar J:

This is claim for damages arising out of a motor accident.

The 1st plaintiff owned a small motor lorry in 1981 in which he transported pineapples which he had purchased from road side growers back to Muar for sale.

The 2nd plaintiff is his son.

On 17 March 1981 the 1st plaintiff was driving along the Muar-Yong Peng Road. His son was seated beside him acting as lorry attendant. About the 17th milestone on the right hand side of the road as one faces Yong Peng was a pondok which was a pineapple pick-up point.

As one approached this from Muar the road was straight for a considerable distance.

The 1st plaintiff's case is that as he approached the pick-up point, he put out his left hand side trafficator, slowed down and moved partly onto the grass verge on the left hand side of the road where he stopped and turned off his engine. Before he commenced this manoeuvre he says that he had sighted in his rear view mirror a lorry following him approximately 100 feet behind. He did not then see anything coming from the front.

But no sooner had he returned off his engine he heard a violent impact from the rear of his lorry, lost consciousness and woke up in hospital.

In cross-examination he maintained his version but some doubt was created as to how far behind him the lorry which collided into him was when the 1st plaintiff commenced his manoeuvre. In the trial before me, he claimed that the lorry was about a 100 feet away but in previous criminal proceedings in which the 1st defendant had been prosecuted, the 1st plaintiff admitted that he had said that it was only 29 feet away. The full circumstances in which that answer was given in the Traffic Court was not clarified before me.

The 1st plaintiff's son, who gave evidence, was not of much assistance to the Court. However, the 1st plaintiff called the pineapple vendor who was minding the Pondok at the time of the accident. He impressed me as a witness of truth. He claimed that he was about 60 feet away when he first sighted the 1st plaintiff's lorry. It was then in motion. About 150 feet behind it was the 1st defendant's lorry travelling fast. He said that the 1st plaintiff's lorry drove on to the verge and stopped and about half a minute later the 1st defendant's lorry came and collided into its rear. At the time there was an oncoming car from Yong Peng. The 1st defendant's lorry then drove on and stopped some distance away.

At the time of the accident, the 1st defendant was only 23 years old. He was driving a full sized lorry half loaded with oil palm fruits. He had come out into the main Muar-Yong Peng Road from a side road and claims to have been following the 1st plaintiff's lorry for about 1 to 2 miles. He claims he was about 40 feet behind. At the scene of the accident, he claims that the 1st plaintiff stopped suddenly on the road itself, without giving any previous warning of his intention to do so. No brake lights were seen. The 1st defendant then swerved to the right to pass but an oncoming taxi forced him to swerve back to the left and the impact occurred.

The 1st defendant's attendant was a totally unimpressive witness. He did not inspire sufficient confidence in me to place any weight upon his testimony.

By way of independent evidence there were some photographs of the 1st plaintiff's lorry. This shows that it received the full force of the impact at the rear off side corner. The damage is very severe because the entire rear body has been pushed out of joint and literally smashed into smithereens. The lorry is shown in situ in a ditch well below the road level. This place is completely over-grown with lallang and belukar. There are no photographs of the 1st defendant's lorry.

There is also a sketch plan which creates as many problems as it solves. A to B is shown as the near side verge facing Yong Peng and is 8 feet. B to C the left half of the road is shown as 21 feet. There is a broken line marking the centre of the road. C to D is the right half of the road also shown as 8 feet. And D to E which is the off side verge is shown as 18 feet 9 inches. There is an obvious mistake here and it is more likely that this road was 16 feet wide divided into two equal halves of 8 feet each.

The defendant admits that after the accident he brought the police to the scene and his lorry had remained where it was. It is shown on the plan nearly 273 feet away from the point of impact.

The mark Q on the plan is the commencement of a tyre mark obviously made by the 1st plaintiff's lorry. It is 51 feet long. It straddles a part of the metal road and then goes over the verge and ends some distance from the rear of the 1st plaintiff's lorry. There is nothing in the plan to show how far the point Q was from the nearside edge of the road. Nor is there anything to show how far the terminal point of this mark was from the 1st plaintiff's lorry. Another difficulty is that the key to the plan states this mark to be from Q to L. L is shown both on the plan and in the key as being the rear off side wheel of the lorry. But in the plan itself the mark has been drawn from Q towards the direction of M which is the nearside rear wheel of the lorry. Consequently the only safe finding one can make is that the 1st plaintiff's lorry left a mark some distance from the nearside verge which stopped some distance from the rear of the lorry. Considering that there is a sharp drop from the nearside edge of the road into the ditch where the lorry ended the value of this tyre mark as a factor in the equation for liability, is problematical.

But something else of significance emerges from the sketch plan. It was the defendant's case that the plaintiff had done something dangerous when he stopped his lorry half on the verge and half on the road. The 1st plaintiff admitted that this could be a dangerous thing to do but contended that he had no choice but to park in that way because only a part of the verge was solid enough to bear the weight of his lorry. The 1st defendant on the other hand having collided with the rear of the 1st plaintiff's lorry is shown on the plan to have parked his vehicle entirely on the road itself and left it there when he went to the Police.

The only other relevant evidence given is from the plaintiff's repairers. This was to the effect that the lorry was a total loss because the chassis had been bent and the vehicle was consequently not worth repairing.

From the totality of this evidence I find as a fact that the 1st plaintiff did signal, slow down and stop as he claims partly on the verge and partly on the road. The pineapple vendor has confirmed this. The interval of time which elapsed between that point in time and the impact indicates that the lorry must have been some distance away when the 1st plaintiff commenced his manoeuvre towards the left. Had the 1st defendant been keeping a proper lookout he should have observed that the lorry in front was slowing down and turning to the left with a view to stopping on the left side of the road.

But the 1st defendant was obviously going too fast in all the circumstances. His attention would have been focussed not only on the 1st plaintiff's vehicle in front of him but also on the vehicle coming in the opposite direction. The lorry is 6 feet wide in front. Half the road is 8 feet wide. The Court has not been told on which part of the road the oncoming taxi was, but it is not unreasonable to infer that it was travelling somewhere close to the crown of the road.

Since there is absolutely no indication that the 1st defendant slowed down to keep pace with the 1st plaintiff, it must follow that he maintained his speed thinking that he could squeeze between the 1st plaintiff's lorry and the oncoming car but realised too late that his only option to avoid a headon collision with oncoming car was to clip the 1st plaintiff's lorry as he passed it.

These findings are supported by the damage to the offside of the lorry which commences from the offside corner and proceeds down the side board at the cab and mudguard. On the balance of probabilities the tyre mark was made by one of the nearside wheels of the 1st plaintiff's lorry. Being stationary it obviously pivoted at that point due to the force of the impact on the offside corner, and slewed round into the ditch. The only reason why the lorry has gone on for another 273 feet without leaving any independent marks on the road shows that the 1st defendant did not take any adequate avoiding action.

To assist on my deliberation on liability, Counsel for the defendants referred me to *Haron v. Macaulay* [1969] 1 MLJ 169, *De Cotta v. Tan Hock Lee* [1972] 2 MLJ 173, *Kwek How Bok v. Lee Sin Kweng* [1966] 1 MLJ 185. Plaintiff's Counsel referred to *Abdul Mokhti bin Haji Ahmad v. Idris b. Ibrahim* [1977] 2 MLJ 85, *Tan Song Gue v. Goh Ya Tian* [1983] 1 MLJ 60 and *Ahmad Nordin b. Hj. Mazlan & Anor. v. Eng Ngat Hua & 7 Ors.* (K.L. Federal Court Civil Appeal No. 125 of 1984 - unreported).

The problem which such citations generate is best illustrated by the article written by Pritam Singh Brrard in [1985] 1 *Malaysian Current Law Journal* at p. 226 in which a number of cases were collected of rear vehicular collisions in which Courts have given variable findings on contributory negligence. The impression left to be inferred is that there is no judicial consistency in these matters.

In a previous case I referred to the case of *Qualcast (Wolverhampton) Ltd. v. Haynes* [1959] AC 743 where Lord Somervell said at p. 757:

> I hope it may be worthwhile to make one or two general observations on the effect on the precedent system of virtual abolition of juries in negligence actions. Whether a duty of reasonable care is owed by A to B is a question of law. The question whether on the facts in that particular case there was or was not a failure to take reasonable care was a question

> for the jury. There was not, and could not be, complete uniformity of standard. One jury would attribute to the reasonable man a greater degree of prescience than would another. The jury's decision did not become part of our law citable as a precedent. In those days it would only be in very exceptional circumstances that a Judge's direction would be reported or be citable. So far as the law is concerned they would all be the same. Now that negligence cases are mostly tried without juries, the distinction between the functions of Judge and jury is blurred. A Judge naturally gives for the conclusion formerly arrived at by a jury without reasons. It may sometimes be difficult to draw the line, but if the reasons given by a Judge for arriving at the conclusion previously reached by a jury are to be treated as "law" and citable, the precedent system will die from a surfeit of authorities.

In Pollock & Mulla on the *Indian Contracts Act* 9th Edn., at p. 373 there is a passage in the commentary to s. 46 that:

> It is difficult to understand why decisions should be reported on the question of what is a reasonable time, which is declared by the Act itself to be always a question of fact;

Quite simply, therefore, and to use the time-honoured expression, the issue of liability in every negligence case must be decided on its own facts, and each such decision is only authority for the totality of the facts of that particular case.

Consequently I would indicate that the cases which have been cited are of no help to this Court one way or the other and I now decide the issue of liability only on the facts before me.

I find that the defendant was wholly liable for this accident. He was driving on a straight road in broad daylight. He must have observed the vehicle in front commencing its manoeuvre from the road towards the verge and having reached it, come to a stop. Motor vehicles do not just stop dead even when the brakes are forcibly applied. In this case there are no brake marks from the 1st plaintiff's lorry which gives rise to the inference that he must have slowed down and stopped in the normal way. I do not place any adverse significance on the plaintiff's answer in cross- examination that what he did could be dangerous. In the circumstances of this case, he had no choice and in parking his vehicle as he did, the 1st plaintiff was one better than the defendant who left his lorry parked entirely on the left hand side of the road.

There will therefore be judgment for the plaintiffs against the defendants.

I now turn to quantum.

The 2nd plaintiff suffered superficial abrasions over the right lateral aspect of the chest, and lacerated wounds on the right elbow, right index finger, and in the web between the left ring and little finger. He was given out-patient treatment at the Muar Hospital and sent home the same day. Both Counsel have submitted that RM2,000 is a fair award for general damages for pain and suffering etc. and I make an award accordingly. There is also a claim for loss of earnings. The 2nd plaintiff claims that as a result of the loss of his father's lorry he also lost his employment until a new lorry was purchased. He admits that he did some light work in the interim. He claimed that he was earning RM300 a month whilst working for the 1st plaintiff but we only have his bare word for this. I consider a sum of RM250 adequate compensation under this head. The total award for the 2nd plaintiff is therefore RM2,300 including RM50 agreed specials for transport expenses.

The 1st plaintiff's injuries were far more severe. At the time of the accident he was 49 years old. From the accident he sustained a superficial laceration of the forehead for about 6 inches long, fracture of the right tibia and fibula with deep laceration on the right leg. He was admitted

into Muar hospital the same day. He was discharged on 4 April 1981 and thereafter attended for out-patient treatment. Dato Yeoh Bok Choon the former State surgeon Johore saw him on 15 August 1981. At the time the 1st plaintiff was not able to walk except with the aid of crutches. There was pain and tenderness at the fracture site just below the right knee joint. There was foot drop of the right foot with movements of the right ankle joints grossly restricted in all directions. The right leg was also half an inch shorter that the left. X-rays showed that the fibula was broken about 3 inches below the knee joint and the ends were in an overlapping position. The tibia was broken in two points with the upper break about 3 inches below the knee joint in a comminuted fracture. The ends were overlapping and separated with broken pieces of bone in between. There were no signs of union. Dato Dr. Yeoh predicted then that if the state of the affairs then obtaining were to continue the 1st plaintiff would be permanently incapacitated and that in the condition in which he was, the 1st plaintiff was totally unfit for any physical work and could not drive any vehicles. Dato Dr. Yeoh gave evidence at the trial on 18 September 1984. He said that the 1st plaintiff should recover with proper treatment and that the residual incapacity at this time was a shortening of half an inch.

I had the benefit also of observing the 1st plaintiff moving around in the Court room. He can walk unaided but there is a visible limp. Defence Counsel suggested a figure between RM9,000 to RM13,000 for general damages for pain and suffering, loss of amenities, and residual disability.

Mr. Ramasamy's figure was RM4,000 for the pain and suffering and RM16,000 for the fractures and a further sum of RM3,000 to RM5,000 for loss of amenities i.e. a global sum of RM25,000 with a reduction for overlapping.

In my view RM15,000 is a fair award for general damages under all the conventional heads.

For transport, special expenses in hospital and out patient treatment, the parties had agreed RM450 which I now award.

The 1st plaintiff's lorry was a total write-off, RM5,000 was claimed for this and in support the 1st plaintiff called two repairers. One assessed the cost of reinstating the lorry at RM4,500 and the second estimated the pre-accident value of the lorry at RM4,800. There was no rebutting evidence from the defence. My award is RM4,800 for this item.

Another item was a claim for loss of earnings at the rate of RM1,000 per month from the date of the accident for 14 months and a further claim of RM400 per month for partial loss of earnings up to the date of trial.

I agree with Mr. Cheah that this item is a claim for special damages which must be strictly proved. Yet the only evidence that was called was the bare assertion of the 1st plaintiff that his pre-accident earning was RM1,000 per month.

In claims of this nature, where the best evidence available has been produced, the Court will do the best it can to make some award.

But where evidence is or ought to be available and is not produced, the Court should not be left to speculate what would be an appropriate sum to award. It is inconceivable that the 1st plaintiff did not keep accounts of his purchases and sales and of his profits or the wages he paid his employees even if he was only conducting a family business. Besides there is a matter of his tax returns. In these circumstances I make no award for loss of earnings.

I agree with Mr. Cheah that some award can be made for loss of earning capacity. The figure of RM200 per month has been suggested for 3 years and consequently I award RM7,200 for this item.

To sum up, the decision on liability is 100% against the defendants. 1st plaintiff to have RM26,450 for general and special damages. 2nd plaintiff to have RM2,300 for general and special damages. Costs to be taxed and paid by the defendants.

Since all the special damages awarded by me accrued before the Writ was filed, I now order a flat rate of eight percent interest on general and special damages from the date of the service of the writ up to the date of judgment.

Thereafter interest will be at 6% per annum up to realisation.

Also found at [1986] 1 CLJ 338